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Final Report, Feb. 4, 1892.

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REPORT

OF THE

CODE COMMISSION

1892.

FINAL REPORT

OF THE

CODE COMMISSION

In pursuance of the

ACT OF MARCH 6, 1891.

Filed with the Secretary of State February 4, 1892.

State of Montana

Report of the Code Commission

To the Legislative Assembly:

The Code Commissioners, appointed in pursuance of the Act of the Legislative Assembly of March 14th, 1889, and the Act amendatory of and supplemental thereto of March 6th, 1891, submit their final report as follows:

The Commissioners have prepared, completed and filed with the Secretary of State, as required by law, the four Codes, viz: The Civil Code, The Penal Code, The Code of Civil Procedure and the Political Code. These Codes have been printed and bound in separate volumes by the State Auditor and are ready for presentation to the Legislative Assembly.

Each of the Codes presented is prepared as a separate bill and will be, if passed by your honorable body, a separate Act though the provisions of the four Codes must be construed as though all the Codes were part of the same Act.

In the Act creating the Code Commission it was provided that the Commissioners, in their report, should designate what statutes or parts of statutes are repealed by the provisions of any of the Codes.

In reference to this matter the Commissioners would call

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the attention of the Legislative Assembly in the first place to the proposed Civil Code.

I. In section 3083 of that Code will be found the statutes repealed thereby. This repealing section is subject to the provisions of section 3082 of that Code which provides that such repeal does not affect any existing right or any action or proceeding already taken except as provided in the Civil Code itself at the time the Code goes into effect.

II. In the proposed Penal Code there is no repealing section, but such Code must be adopted subject to the provisions of sections 4 and 5 of that Code which provide that "The provisions of the Penal Code, so far as they are the same as existing statutes, must be construed as continuations thereof and not as new enactments, and that no act or omission commenced after twelve o'clock noon of the day on which this Code takes effect as a law, is criminal or punishable except as prescribed or authorized by this Code, or by some of the statutes which it specifies as continuing in force, and as not affected by its provisions, or by some ordinance, municipal, county or township regulation, passed or adopted under any such statutes, and in force when this Code takes effect. Any act or omission commenced prior to that time may be enquired of, prosecuted and punished in the same manner as if the code had not been passed."

III. The proposed Code of Civil Procedure is subject to the provisions of Sections 2220, 2221, 2247 and 2248 of that Code. These sections provide what sections are in force and what are repealed and the conditions and limitations thereof.

The proposed Code of Civil Procedure in effect supersedes all of the former statutes in reference to the practice in civil actions and proceedings, including the Probate Practice Act.

IV. In the proposed Political Code there is no repealing section, that is a clause repealing statutes or parts of statutes that will be superseded or abrogated by the adoption of such Code.

It is recommended that there be substituted for Section 3793 of the proposed Political Code the following sections:

Section 3793. Subject to the provisions of Sections 6, 7, 8, 9, 17 and 18 and the next section, the following statutes and parts of statutes are hereby repealed: All public statutes, as defined in Section 2026 of the Code of Civil Procedure, heretofore enacted and not repealed by any of the provisions of the Civil Code, the Penal Code or the Code of Civil Procedure and all statutes and parts of statutes not continued in force by any of the provisions of the four Codes are hereby repealed.

SEC. 3974. Nothing in any of the four Codes affects any of the provisions of the following statutes, but such statutes are recognized as continuing in force as to vested rights, rights of property and the right to enforce the same thereunder:

1. All acts incorporating cities, towns or other municipal corporation and acts amendatory and supplemental thereto, subject to Sections 3562, 3563, 3564 and 3565 of this Code.

2. All acts authorizing the Board of County Commissioners or School Trustees to redeem outstanding indebtedness.

3. All acts concerning the levy, assessment and collection of taxes as mentioned in Section 2692 of this Code, and the sale of property therefor.

4. All acts concerning the discovery, location and record of mining claims and work thereon so far as they affect locations made prior to the adoption of this Code.

5. All acts or parts of acts upon which any vested right is founded or the remedy or the right to enforce the same is given.

V. If the proposed Codes are adopted the following named statutes will be repealed and no substitute therefor of a similar nature will be found in the Codes:

1. An act entitled "An Act to create the office of County Auditor," approved March 7th, 1891. In place of County Auditor the office of State Examiner has been created as provided in Article XII., Chapter III, Title 1, Part III of the Political Code.

The State Examiner is a constitutional officer and the Legislative Assembly must provide for his duties as prescribed in Section 8, Article VII of the Constitution. When a State Examiner is appointed the necessity for a County Auditor ceases.

2. An act entitled "An Act with Reference to Estrays upon the Public Domain," approved March 5th, 1891.

It is submitted if this act is constitutional, which is doubtful, the powers conferred thereby ought not to be given to others than public officers.

In the opinion of the Commissioners the provisions of Sections 2175 of the Political Code which apply to all domestic animals are sufficient to protect the owners of animals.

3. An act entitled "An Act Concerning the Historical Society of the State of Montana, and making an Appropriation therefor," approved March 4th, 1891.

In the opinion of the Commissioners this act is unconstitutional for the reason that State aid and money is asked and appropriated for an institution not wholly under the control of the State, or its officers. Section 35, Article V, of the Constitution provides that "No appropriation shall be made for charitable, industrial, educational or benevolent purposes to any person, corporation or community not under the absolute control of the State. * * *"

Section 1652 of the Political Code provides that whenever the Historical Society of Montana donates and turns over to the State its property the Board of Trustees of the State Library is authorized to take charge of the same.

This is all that can be done in the opinion of the Commissioners on the part of the State,

VI. There is nothing in any of the Codes licensing gambling, on the contrary all gambling games known as banking or percentage games are prohibited. Sections 360, 367 of the Penal Code. And playing such games and renting a building for such purposes is made a misdemeanor.

VII. The statute for the formation of private corporations has been changed and such corporations can only be formed for the purposes mentioned in Section 263 of the Civil Code, and all corporations now existing formed for any other purpose than one of those mentioned in said section are dissolved.

The law as laid down in the proposed Civil Code in relation to the formation of private corporations prevents the organization of such corporations for strictly private purposes and the carrying on of ordinary trading and mercantile business. The formation of such corporation is open to many objections on account of the many fraudulent practices indulged in by their corporators.

VIII. The statutes in reference to Stock Commissioners and Stock Inspectors have been codified and will be found in the Political Code, Sections 1960-1981 inclusive.

These laws have been incorporated into the Code, the Commissioners being unwilling either to repeal or modify them, but they are subject to many objections as to their constitutionality and expediency. The Commissioners leave the whole matter to the Legislative Assembly with the suggestion that such laws are contrary to the spirit at least of the Constitution, which prohibits class legislation and the delegation of legislative and administration powers to a body unknown to fundamental law.

The stray law as hereinbefore mentioned has been repealed by the Code. This law was so manifestly unconstitutional and unjust that it was deemed absolutely necessary to leave it out of the Code. By this law the Stock Com-

missioners were not only granted legislative and administrative powers but to some extent acted in a judicial capacity. The Stock Commissioners, their officers and employes, were authorized to take up summarily one kind of property, to-wit, horses, and sell it and pay the proceeds of the sale into the treasury for the benefit of the Stock Inspector and Detective fund.

In reference to the law relating to marks and brands in the proposed Codes (Section 1950, Political Code) the Secretary of State is made the general recorder of marks and brands instead of the Secretary of the Stock Commissioners. This is done in order to avoid the constitutional objection above referred to.

IX. The law giving a bounty for killing wild animals has been codified in the Political Code, Sections 2060-2071, with this modification however, that the bounties must be paid out of each county treasury of the counties in which the animals are killed instead of out of the State Treasury, as prescribed in the Statutes.

The Commissioners would, however, recommend that Article VIII, Chapter V, Title VII, Part III, Sections 2060-2071, of the proposed Political Code, be stricken out, and this will in effect repeal all statutes heretofore passed giving bounties for killing wild animals. A bounty law of this kind is subject to so many frauds and is so expensive, and the good resulting therefrom so remote and unsatisfactory that it ought to be wiped from the statute book.

X. All statutes offering to pay a bounty for the production of an article of food or commerce or exempting any particular property from taxation have not been codified, and in effect will be repealed on the adoption of the Codes for the reason that all such laws are in conflict with the Constitution.

XI. In reference to water rights and the appropriation and the use of water for irrigation and other beneficial purposes the Commissioners have codified the Statutes as they now exist and have made no additions to the same.

The law of water rights will be found in the proposed Civil Code, Sections 1210 to 1232 inclusive.

Section 15 of Article III of the Constitution declares that the use of all water and the right to carry the same over lands as well as the site for reservoirs for collecting and storing the same is a public use. The Legislature, no doubt, has the power to regulate and control such use in a manner most beneficial to the public. This is a matter of such Legislative discretion that the Commissioners do not desire to suggest how the provisions of such section should be carried into effect.

It opens the whole question of irrigation and the system or systems under which water must be used and distributed and which must sooner or later be met by the Legislative Assembly.

XII. In the proposed Political Code, Sections 2320-2364, will be found the law relating to the public lands of the State. This is substantially the statute passed by the Legislative Assembly of 1891.

No doubt additions and amendments will have to be made to the law, but until the State Board of Land Commissioners has made its report showing the workings of the statute and whether it is efficient or not, nothing can be done in the shape of further legislation.

It will be for the Legislative Assembly to determine under the advice and suggestion of such Board as to what amendments are necessary, and whether any new offices should be created to fully carry out not only the objects of Congress in granting the land to the State, but to secure to the State the best and most available lands.

XIII. In order to secure the public lands donated to the State by the Congress of the United States, and in order to carry out the provisions of the Constitution of the State, there have been created for the purposes of education the following institutions: The University of Montana, School of Mines, Agricultural College of Montana, State Normal

School; Sections 940-1011, Political Code, and for the purpose of education and reformation, the State Reform School, Penal Code, Sections 1875-1876.

The first four of these institutions are placed under the control of the State Board of Education, and the last one under the control of the State Prison Commissioners.

The details of the management of these institutions are not given for the reason that until the Legislative Assembly concludes to erect suitable buildings for their accommodation there will not be much of anything to manage.

The place of the location of each of these institutions is left blank, which must be filled by the Legislative Assembly. It is suggested that the University of Montana be located at some place and that the other three educational institutions be made parts of the university and be connected with it under their several different names. One building would be sufficient for all, at least for a time, and one corps of teachers could perform all the necessary duties.

The Reform School should be located at some particular place at once and the necessary buildings erected.

Article XVIII of the Constitution of this State authorizes the Legislative Assembly to provide for a Bureau of Agriculture, Labor and Industry, etc. The Commissioners did not think they were at liberty to create this bureau or suggest its creation, and consequently leave the whole matter to the Legislative Assembly for its action.

XIV. The management and control of the State Insane Asylum and the Deaf, Dumb and Blind Asylum are prescribed in the Political Code, Sections 1550-1627 inclusive. The location of each of these institutions is left blank and the place to be designated may be filled or not in the judgment of the Legislative Assembly. The care for these persons is provided for, until the proper buildings are erected, in the sections referred to.

XV. It will be seen by a reference to the Political Code, Sections 2370 to 2376 inclusive, that the law relating to the

discovery and location of mining claims has been changed to some extent. This has been done in order to make plain certain things which were somewhat obscure in the old law.

XVI. All laws of a general nature, including those enacted by the Second Legislative Assembly of the State, are to be found in the four proposed Codes, except those mentioned in this report.

The Commissioners have, since the adjournment of the last Legislative Assembly, added such amendments as in their opinion were necessary to harmonize and complete the Codes, and the amendments are incorporated in the Codes as printed.

The Commissioners have no suggestions to make as to further amendments except the one mentioned in paragraph IV of this report and the striking out of certain sections hereinbefore referred to.

XVII. There have been no material changes made by the Commissioners in the proposed Code of Civil Procedure from the existing Statutes except to arrange, perfect, classify and consolidate the law.

XVIII. The same thing can be said as to the Penal Code, both of which Codes have been so prepared as to make existing laws conform to the Constitution.

XIX. The School Law, Political Code, Sections 930-1324, has been classified and consolidated with the constitutional provisions with reference to schools added.

XX. The State Militia Law, Political Code, Sections 1350-1539, is made complete and in conformity to constitutional provisions.

XXI. The law of Elections, Political Code, Sections 650-912, which includes the registration of voters and the Australian ballot system has followed existing statutes and no material change has been made therein.

XXII. The Revenue Law, Political Code, Sections 2400-2762, is substantially the same as passed by the last Legislative Assembly with many of its inconsistencies harmonized.

XXIII. The law for the government of counties, cities and towns, Political Code, Sections 2770-3654, is comparatively new, but existing statutes have been followed as far as practicable.

The salaries and fees of officers, Political Code, Sections 3130-3203, are classified according to population instead of the value of property.

XXIV. The duties of State officers, their classification, mode of election or appointment and salaries are prescribed in the Political Code, Section 80-642. This is new and made in conformity with the Constitution.

The Clerk of the Supreme Court is *ex-officio* reporter of that court, Political Code, Sections 470-479. As a matter of economy and expediency the Commissioners are of the opinion that the clerk is the proper person under the law to prepare and publish the official reports inasmuch as all of the opinions are filed in his office and the syllabus of each opinion prepared by the Justices of such Court, and such Justices read the proof.

XXV. The law in reference to the State Prison is in the Penal Code, Sections 810-837. The Board of State Prison Commissioners has full control of the State Prison with power to appoint a warden, whose duties and compensation are provided for.

XXVI. The law in reference to Boards of County Commissioners and other county officers is in the Political Code, Sections 2835-3122. The existing statutes have been followed with considerable additions thereto and constitutional provisions added.

XXVII. The proposed Civil Code is mostly new and consists of a part of the Common law with such changes as were deemed advisable reduced to the form of a statute.

This Code is almost entirely taken from the Civil Code prepared by the Hon. David Dudley Field for the Legislature of the State of New York, and the Civil Code adopted by the State of California. Certain changes have been made to adapt it to the conditions of this State and the provisions of the Constitution.

The right of Dower is established in this Code instead of the right to community property, as in the California Civil Code.

XXVIII. Some changes have been made in the law of Divorce. The grounds for divorce are the same as in the existing statutes, Civil Code, sections 65-128, but the innocent party cannot marry until after the expiration of two years, the guilty party three years from the entry of judgment of divorce.

XXIX. The Commissioners have endeavored to revise, simplify, arrange and consolidate all the public statutes of Montana which are in force at this time and to put them into the proposed four Codes, which are presented for the consideration of the Legislative Assembly.

XXX. If the Codes are adopted by the Legislative Assembly all of them should go into effect on the same day and the blank in section 2 of the Penal and Political Codes and section 3060 of the Civil Code and section 2215 of the Code of Civil Procedure should be filled, designating the day, which the Commissioners recommend should be the first day of July, 1893.

XXXI. There have been prepared complete indexes to each of the four Codes. No general index has been made for all the Codes for the reason that it was found impracticable and unnecessary so to do until the Codes were finally adopted by the Legislative Assembly and printed as the law of the State. When so printed a general index can be readily made from the four indexes already prepared.

XXXII. In the act amending the act creating the Code Commission, approved March 6th, 1891. it was provided

that the Political Code must contain the Declaration of Independence, the Act for the Admission of Montana as a State, The Constitution of the United States and of the State and indexes to the same. The Commissioners have prepared, ready for printing, all the foregoing instruments, with proper indexes, but they were not printed with the proposed Political Code because it was unnecessary to incur that expense before the adoption of the Codes. These instruments can be printed and attached to one of the Codes, if adopted, when finally printed by the State. The Commissioners would suggest that these instruments, in addition to the others hereafter mentioned, be printed and bound in the front part of the Civil Code. The instruments to be so printed are as follows: "Magna Charta," "The Declaration of Independence," "The Act for the Admission of Montana as a State," "The Constitution of the United States," "The Constitution of the State of Montana," "The Acts of Congress regulating Naturalization," and the "Authentication of Laws and Records."

The Commissioners also suggest that the general index of all the Codes, when prepared, be bound in the back part of the Penal Code.

If these suggestions are observed the number of pages in each Code will be about equal.

The Code Commissioners submit the foregoing as their final report.

D. S. WADE.

F. W. COLE,

B. P. CARPENTER,

Code Commissioners.

HELENA, Mont., February 4th, 1892.

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